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PP

v.

MOHD NOR RIZA MAT TAHAR

B

FEDERAL COURT, PUTRAJAYA
NIK HASHIM FCJ
AUGUSTINE PAUL FCJ
HASHIM YUSOFF FCJ
[CRIMINAL APPEAL NO: 05-126-2008 (N)]

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26 MAY 2009

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Appeal against substitution of conviction with lesser one - Intention to kill - Corroboration - Evidence of forensic consultant - Defence of intoxication -*

D

Denial by accused of intention to kill deceased - Whether evidence available overwhelming in support of conviction of murder

CRIMINAL PROCEDURE: *Conviction - Substitution of - Appeal against substitution of conviction under s. 302 Penal Code with one under s. 304 - Intention to kill - Corroboration - Evidence of forensic consultant*

E

- Defence of intoxication - Denial by accused of intention to kill deceased - Whether evidence available overwhelming in support of conviction of murder

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This was an appeal by the prosecution against the decision of the Court of Appeal setting aside the conviction and sentence of the accused/respondent under s. 302 of the Penal Code ('Code'), and substituting it with a conviction under s. 304 of the Code and sentence of ten years' imprisonment. The prosecution argued that the evidence of the main prosecution witness, Johaniza Atin

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('SP4'), need not necessarily be corroborated although there was an allegation of instigation against him by the defence. Under cross-examination, SP4 totally denied this allegation; the gist of SP4's evidence was that the respondent specifically told him of his intention to kill the deceased. The respondent had further

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expressed the same intention to SP4, when he had a Rambo knife in his hand and went out of the prison barrack to confront the deceased who had just arrived on his motorcycle. When SP4 followed and caught up with the respondent, he saw the respondent still holding the knife and that the deceased's shirt was

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full of blood. When SP4 took away the knife from the respondent,

he heard the deceased say "Why did you stab me kuching?", "kuching" being the nickname given to the respondent. On this point, the defence submitted that the respondent had no intention to kill the deceased but merely to confront him at SP4's suggestion so that the deceased would stop defaming him. The respondent also raised the defence of intoxication, alleging that just before the incident he had consumed a can of beer and was intoxicated at the time of the incident. The trial judge found the respondent guilty of murder, which decision, upon appeal was reversed by the Court of Appeal, resulting in the present appeal.

Held (allowing the appeal)
Per Hashim Yusoff FCJ delivering the judgment of the court:

(1) SP4's evidence was in fact corroborated by the evidence of another prison warden, Rahim Yahadi ('SP5'), who happened to be in the common rest room of the prison barrack at the material time. Upon hearing the commotion, SP5 went out of the rest room and saw SP4 holding the respondent from behind. He also saw the respondent holding a knife in his hand. SP5 then immediately ran to get help from Sgt. Yunus ('SP7'), who was at a stall just outside the Seremban prison fencing. Both of them went to the scene whereupon SP7 saw Sgt. Zulkifli ('SP6') holding the respondent, who was struggling. When SP7 took custody of the respondent from SP6, the respondent was still struggling and shouting that he was satisfied because he had stabbed the deceased several times. There was no reason to doubt the evidence of SP4, SP6 and SP7. Based on the above evidence, the respondent's intention to kill was manifestly portrayed by his own words to that effect, coupled with the inference from his conduct in running out with a knife in his hand to confront the deceased who had just arrived at the scene. The fact that SP4 saw the respondent with the knife still in his hand and the deceased's bloodied shirt and that there was nobody else at the scene at the material time could only lead to the one reasonable inference *ie*, that the respondent had stabbed the deceased. This fact was further corroborated by the deceased who uttered the words "Why did you stab me kuching?". The evidence of the forensic consultant, Dr. Sharifah Safoorah ('SP3'), also corroborated SP4's evidence when she concluded that the deceased died as a result of a stab wound on his

A chest and that the wound could possibly be caused by a sharp weapon like a knife. According to SP3, the chances of survival from such a wound was very slim. (paras 8, 9 & 10)

(2) On the defence of intoxication, it was clear from the evidence
B adduced that it was the respondent who voluntarily consumed a can of beer just before the incident. Self-induced intoxication is not a defence under s. 85(ii)(a) of the Code. Moreover in this instant appeal, there was no scientific evidence to support any intoxication of the respondent, having
C considered his conduct before and after the commission of the crime. It was obvious that the respondent knew what he was doing. Apart from his defence of intoxication and allegation of instigation against SP4, the respondent also denied any intention to kill the deceased. He testified that he merely
D confronted the deceased only to get an answer from him as to why he had been badmouthing the respondent by alleging that he had sodomised the respondent as told to him by SP4. As stated earlier, SP4 denied this allegation against him by the respondent. The fact that the respondent took out his own
E Rambo knife when he went to confront the deceased, coupled with his utterance of wanting to kill the deceased as he was not satisfied with what the deceased allegedly did in defaming him, negated the defence of not intending to kill the deceased. (paras 11, 12 & 13)

F **(3)** The evidence available in this appeal was overwhelming in support of a conviction under s. 302 of the Code. With respect, the Court of Appeal had erred in interfering the with the trial judge's finding. (para 15)

G ***Bahasa Malaysia*** *Translation Of Headnotes*

Ini adalah rayuan dari pendakwaan terhadap keputusan Mahkamah Rayuan mengenepikan sabitan dan hukuman tertuduh/responden di bawah s. 302 Kanun Keseksaan ('Kanun'), dan menggantikannya
H dengan suatu sabitan di bawah s. 304 Kanun dan sabitan sebanyak 10 tahun dalam penjara. Pendakwaan menghujah bahawa keterangan saksi utama pendakwaan, Johaniza Atan ('SP4'), tidak semestinya perlu disokong walaupun terdapat suatu pengataan penghasutan terhadapnya oleh pembelaan. Di bawah pemeriksaan
I balas, SP4 menafikan pengataan ini dengan sepenuhnya; isi

keterangan SP4 ialah bahawa responden telah memberitahunya dengan spesifik akan niatnya untuk membunuh si mati. Responden telah lebih lagi menunjukkan niat yang sama kepada SP4, apabila beliau memegang pisau Rambo dalam tangannya dan telah keluar dari berek penjara untuk berdepan dengan si mati yang telah baru tiba atas motosikalnya. Apabila SP4 mengejar dan mencapai responden, beliau nampak responden masih memegang pisau itu dan bahawa kemeja si mati berlumuran darah. Apabila SP4 mengambil pisau dari responden, beliau mendengar si mati kata "Kenapa kamu tikam saya kuching?", "kuching" merupakan nama ringkasan yang diberi kepada responden. Berhubungan dengan perkara ini, pembelaan menghujah bahawa responden tidak berniat untuk membunuh si mati tetapi hanya untuk berdepan dengannya mengikut cadangan SP4 supaya si mati berhenti memfitnah beliau. Responden juga membangkit pembelaan kemabukan, mengatakan bahawa betul-betul sebelum insiden itu beliau telah minum satu tin bir dan mabuk semasa insiden itu. Hakim perbicaraan mendapati responden bersalah atas tuduhan membunuh, keputusan yang mana, setelah rayuan dibuat telah diterbalikkan oleh Mahkamah Rayuan, mengakibatkan rayuan ini.

Diputuskan (membenarkan rayuan)
Oleh Hashim Yusoff HMP menyampaikan penghakiman mahkamah:

(1) Keterangan SP4 sebenarnya telah disokong oleh keterangan seorang lagi warden penjara, Rahim Yahadi ('SP5'), yang telah berada dalam bilik rehat awam berek penjara itu pada masa yang material. Setelah mendengar kekecohan itu, SP5 keluar dari bilik rehat itu dan nampak SP4 memegang responden dari belakang. Beliau juga nampak responden memegang sebilah pisau dalam tangannya. SP5 kemudiannya lari untuk mendapat pertolongan daripada Sgt. Yunus ('SP7'), yang berada di sebuah kedai di luar pagar penjara Seremban. Kedua-dua mereka pergi ke tempat kejadian itu dimana SP7 nampak Sgt. Zulkifli ('SP6') memegang responden, yang sedang melawan. Apabila SP7 mengambil kustodi responden dari SP6, responden masih melawan dan menjerit bahawa beliau berpuas hati kerana telah menikam si mati beberapa kali. Tiada apa-apa sebab untuk meragui keterangan SP4, SP6 dan SP7. Berdasarkan keterangan di atas, niat responden untuk membunuh telah jelas dibuktikan oleh perkataannya sendiri, berganding dengan

A inferens kelakuannya lari keluar dengan sebilah pisau dalam tangannya untuk berdepan dengan si mati yang telah baru sampai di tempat kejadian itu. Fakta bahawa SP4 nampak responden dengan pisau itu masih dalam tangannya dan kemeja si mati berlumuran darah dan bahawa tidak ada sesiapa lagi di
B tempat kejadian itu pada masa yang material boleh hanya membawa kepada suatu inferens yang munasabah, iaitu, bahawa responden telah menikam si mati. Fakta ini disokong lagi oleh si mati yang mengatakan perkataan-perkataan "Kenapa kamu menikam saya kuching?". Keterangan konsultan
C forensik, Dr. Sharifah Safoorah ('SP3'), juga menyokong keterangan SP4 apabila beliau memutuskan bahawa kematian si mati adalah hasil luka yang disebabkan oleh tikaman pada dadanya dan bahawa luka itu boleh dibuat oleh suatu senjata tajam seperti pisau. Menurut SP3, peluang untuk terus hidup
D dari luka sebegitu adalah sangat tipis.

(2) Berkenaan dengan pembelaan kemabukan, ia adalah jelas dari keterangan yang dikemukakan bahawa ia merupakan responden yang dengan rela telah minum satu tin bir sejurus sebelum
E insiden itu. Kemabukan yang disebabkan pada diri sendiri bukan sesuatu pembelaan di bawah s. 85(ii)(a) Kanun. Tambahan lagi dalam rayuan semasa, tidak ada keterangan saintifik untuk menyokong bahawa responden mabuk, setelah menimbangkan kelakuannya sebelum dan selepas perbuatan
F kesalahan itu. Selain dari pembelaan kemabukan dan pengataan penghasutan terhadap SP4, responden juga menafikan apa-apa niat untuk membunuh si mati. Beliau memberikan keterangan bahawa beliau hanya berdepan dengan si mati hanya untuk mendapat jawapan darinya mengenai kenapa si mati telah
G mengatakan perkara-perkara buruk tentang responden dengan mengatakan bahawa si mati telah meliwat responden seperti yang diberitahu kepadanya oleh SP4. Seperti yang dikatakan sebelum ini, SP4 telah menafikan pengataan ini terhadapnya oleh responden. Fakta bahawa responden telah mengeluarkan
H pisau Rambonya apabila berdepan dengan si mati, berganding dengan pengataannya ingin membunuh si mati oleh kerana beliau tidak berpuas hati dengan apa yang dikatakan telah dibuat oleh si mati dalam memfitnahnya, membatalkan pembelaan tidak ada niat untuk membunuh si mati.

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(3) Keterangan yang terdapat dalam rayuan ini amat sangat menyokong suatu sabitan di bawah s. 302 Kanun. Dengan hormatnya, Mahkamah Rayuan telah khilaf dalam mencampurtangan dengan dapatan hakim perbicaraan.

Case(s) referred to:
Francis Antonysamy v. PP [2005] 2 CLJ 481 FC ***(refd)***

Legislation referred to:
Penal Code, ss. 85(ii)(a), 302, 304(b)

For the appellant - Awang Armadajaya Awang Mahmud DPP
For the respondent - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co

[Appeal from Court of Appeal, Criminal Appeal No: N-05-14-2007]

[Editor's note: For the Court of Appeal judgment, please see Mohd Nor Riza Mat Tahar v. PP [2009] 3 CLJ 350.]

Reported by Suresh Nathan

JUDGMENT

Hashim Yusoff FCJ:

[1] This is an appeal by the prosecution against the decision of the Court of Appeal which had set aside the conviction and sentence of the accused/respondent under s. 302 Penal Code and substituted it with a conviction under s. 304 Penal Code and a sentence of ten years imprisonment. We allowed the appeal and now give our reasons.

[2] The facts of the case can be adequately found in the grounds of judgment of the Court of Appeal as reported in [2009] 3 CLJ 350.

The Appeal

[3] Before us, the learned DPP argued that the evidence of the main prosecution witness, Johaniza bin Atin (SP4) need not necessarily be corroborated although there was an allegation of instigation against him by the defence. Under cross-examination, SP4 totally denied this allegation (see appeal record p. 31). The gist of SP4's evidence is that the respondent specifically told him of his intention to kill the deceased, Mohd Isnizar bin Yup. The

A respondent had further expressed the same intention to SP4, when he had a Rambo knife (P5) in his hand and went out of the prison's bachelor's barrack to confront the deceased who had just arrived on his motorcycle. When SP4 followed and caught up with the respondent, he saw the respondent still holding the knife
B and that the deceased's shirt was full with blood. When SP4 took away the knife from the respondent, he heard the deceased asking "why did you stab me kuching". "Kuching" is the nickname given to the respondent.

C **[4]** On this point, learned counsel for the defence submitted that the respondent had no intention to kill the deceased but merely to confront him at the suggestion of SP4 so that the deceased would stop defaming him. Also the defence of intoxication was raised by respondent by saying that just before the incident he
D had consumed a can of beer and was intoxicated at the time of the incident.

[5] The learned trial judge however found on the evidence tendered that the intention to kill, by the respondent existed from
E the beginning when the respondent declared to SP4 a few times that he was not satisfied and that he wanted to kill "tinju" (the deceased's nickname). Even after SP4 had removed the knife (P5) from respondent's hand, the respondent while standing near the deceased's head still said "oh, you are still not dead?".

F **[6]** However on appeal, the Court of Appeal held that the learned trial judge had misdirected himself in the judicial appreciation and proper evaluation of the defence case by stating that the defence had failed to raise any reasonable doubt without assigning any valid reasons (see appeal record vol. I p. 13 at para
G 25). This led to the Court of Appeal setting aside the conviction and sentence of the High Court and substituting it with a conviction for the offence of culpable homicide not amounting to murder, punishable under s. 304(b) of the Penal Code and imposing a sentence of ten years imprisonment from the date of
H his arrest.

[7] Having heard the respective arguments, and perused the appeal record, with respect, we disagreed with the reasoning given by the Court of Appeal.

I

Conclusion

[8] We found that SP4's evidence was in fact corroborated by the evidence of another prison warden, Rahim bin Yahadi (SP5) who happened to be in the common rest room of the bachelors prison barrack at the material time. Upon hearing the commotion, SP5 went out of the rest room and saw SP4 holding the respondent from behind. He also saw the respondent holding a knife in his hand. SP5 then immediately ran to get help from Sgt. Yunus (SP7) who was at a stall just outside the Seremban prison fencing. Both of them then went to the scene whereupon SP7 saw Sgt. Zulkifli (SP6) holding the respondent who was struggling. When SP7 took custody of the respondent from SP6, the respondent was still struggling and shouting that he was satisfied because he had stabbed the deceased several times. We found no reason to doubt the evidence of SP4, SP6 and SP7

[9] Based on the above evidence we find that the respondent's intention to kill was manifestly portrayed by his own words to that effect, coupled with the inference from his conduct in running out with a knife in his hand to confront the deceased who had just arrived at the scene. The fact that SP4 saw the respondent with the knife still in his hand and the bloodied shirt of the deceased and that there was nobody else at the scene at the material time could only lead to one reasonable inference ie, that the respondent had stabbed the deceased. This fact was further corroborated by the deceased who utterred the words "why did you stab me kuching?".

[10] The evidence of the Forensic Consultant, Dr. Sharifah Safoorah (SP3) also corroborated SP4's evidence when she concluded that the deceased was killed as a result of a stab wound on his chest. (See appeal record vol. 2 p. 018 para C) and that the wound could possibly be caused by a sharp weapon like a knife. According to SP3 the chances of survival from such a wound was very slim.

[11] On the defence of intoxication, s. 85 of the Penal Code clearly spells out when intoxication could be a defence "if the person charged at the time of the act ... complained of did not know that such act ... was wrong or did not know what he was doing and

A (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act ...

B **[12]** But it is clear from the evidence adduced that it was the respondent who voluntarily consumed a can of beer just before the incident. Self-induced intoxication is not a defence under s. 85(ii)(a) of the Penal Code. Moreover in this instant appeal, there was no scientific evidence to support any intoxication of the C respondent, having considered his conduct before and after the commission of the crime. It was obvious that the respondent knew what he was doing. (See: *Francis Antonysamy v. PP* [2005] 2 CLJ 481).

D **[13]** Apart from his defence of intoxication and allegation of instigation against SP4, the respondent also denied any intention to kill the deceased. He testified that he merely confronted the deceased only to get an answer from him as to why he had been bad mouthing the respondent by alleging that he had sodomised E the respondent as told to him by SP4. As we had said earlier, SP4 denied this allegation against him by the respondent. At the risk of repetition, the fact that the respondent took out his own Rambo knife when he went to confront the deceased, coupled with his utterance of wanting to kill the deceased as he was not F satisfied with what the deceased allegedly did in defaming him, negated the defence of not intending to kill the deceased. We therefore rejected the defence version.

[14] Although learned counsel for the respondent argued that G nowhere did the trial judge give his reasons for disbelieving the defence, he however conceded that we could also reevaluate the evidence as a whole, which we did.

[15] We found the evidence available in this appeal was H overwhelming to support a conviction under s. 302 of the Penal Code. With respect we felt the Court of Appeal had erred in interfering with the finding of the trial judge.

[16] For the above reasons, we therefore allowed this appeal. The order of the Court of Appeal is set aside and the conviction I and sentence given by the trial judge under s. 302 Panel Code are restored.